

# **FRAUD AND FORGERY IN THE 1990s: CAN OUR ADHERENCE TO *FRAZER v WALKER* SURVIVE THE STRAIN?**

Elizabeth Toomey

*Lecturer in Law, University of Canterbury*

It probably never occurs to a New Zealander to have any doubts about his title to the land he holds under a land transfer certificate of title. He knows no reason why anyone should oust him, nor can he see the possibility of anyone coming along and saying that he has no title to his land. 'What is, has been and always has been' is the idea, sub-consciously affecting his views on the land question, and questions of title are narrowed down to the limited compass of his own immediate experience.<sup>1</sup>

Professor Garrow, when writing this, reflected a well-accepted attitude within New Zealand society. As E P Wills commented in the early 1960's, "most New Zealanders ... adopting the national formula of 'she'll be right' have assumed that there are few, if any, difficulties arising from possible weaknesses in our [Torrens] system".<sup>2</sup>

Thirty-five years later, the average New Zealander's attitude is probably a lot more cynical, if not more realistic. The "compass of immediate experience" is no longer as limited as Garrow contemplated. In the early 1990's our media has ensured full public awareness that fraud and forgeries (both of clients' money and of land title documents) are no longer totally unusual events. The solicitors' fidelity fund is, at present, being "topped up" with contributions of large amounts of money from every practising principal within the country, most of whom resent carrying the burden of dishonesty of fellow members of the profession. The attitude of "she'll be right" is fast diminishing.

The question of indefeasibility of title – should it be immediate or should it be deferred? – has, for many years, but significantly not for the last 15 – been a hotly debated topic among academics of property law in New Zealand. Under the principle of deferred indefeasibility a title obtained fraudulently can be defeated until it is "perfected" by a subsequent bona fide transfer for value. In contrast, the immediate indefeasibility theory provides that registration will immediately validate a transfer, even if it is forged or otherwise void or voidable. This latter theory was confirmed in the landmark decision of *Frazer v Walker*<sup>3</sup> in 1967. Many subsequent critical appraisals explored the consequences of the judgment. However, little academic writing on the topic is apparent in any of the New Zealand periodicals from the mid-1970s. Does this imply that the principle of immediate indefeasibility is "set in stone" in this country? If the answer is yes, the writer believes there lies therein an inherent danger of late 20th century complacency. It would be comforting to believe that a principle set in the 1960's can withstand the "tides of time immemorial" but that, in itself, denies an acceptance of changing trends and ideas. If we, in New Zealand, refuse to relook at the debates that resulted from that 1967 case we will be adopting a stance that isolates us from the other Torrens jurisdictions. In both Australia and Canada the debate over immediate

1 J M E Garrow, *Law of Real Property* (5th edn 1960) 299.

2 E P Wills, "Just How Indefeasible Is Your Land Transfer Title" [1963] NZLJ 269.

3 [1967] 1 All ER 649.

and/or deferred indefeasibility is very much alive. The last four years have seen both look carefully, once again, at the principles enunciated. This article looks at the new activity in the indefeasibility field in Australia and Canada and the comparative dormancy in New Zealand. It also examines the concept of "discretionary indefeasibility" originally advocated in 1977 by our Property Law and Equity Reform Committee, and subsequently considered in Australia and Canada.

### THE CURRENT AUSTRALIAN PERSPECTIVE

The notion of immediate indefeasibility as a fundamental concept in the Torrens system is receiving scrutiny in Australia and the impact of several decisions has forced Australians out of a complacency with which New Zealanders at present feel very comfortable. Conveyancers are being warned to take extra care to ensure that their clients deal with the actual registered proprietors.<sup>4</sup> Academics are attempting to assess what effect, if any, some judgments will have, not only on a well-established principle but, more importantly, on an aspiration to achieve a uniform Torrens system initially in Australia but foreseeably throughout all Torrens jurisdictions. Some Australian thought would suggest that the controversial judgments are isolated ones and should be thus regarded, but it is submitted that the disturbance is more profound. The consistent reference in these recent cases to the possible remedy of personal equities (a remedy which effectively disposes of the immediate indefeasibility principle) hints at attempts to find a more equitable solution in situations where immediate indefeasibility does not produce the fairest result. Some judges appear to be prepared to depart from the traditional sanctity of the principle; others leave it untouched.

A brief review of relevant case law in South Australia, Victoria and New South Wales highlights the present uncertainty.

#### South Australia

In *Daniell v Paradiso*<sup>5</sup> it was held that the fabrication of a standard form mortgage and the forgery of one of the signatures on the document rendered the mortgage a nullity. As such it was incapable of registration. This decision overturned the lower Court's finding that Daniell's conduct estopped him from denying the authority of the fraudster and the execution of the mortgage. The question of ostensible authority received careful attention.

Differing interpretations of s 69 (II) of the Real Property Act 1886 have fuelled uncertainty. In *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd*,<sup>6</sup> O'Loughlin J firmly stated that, under s 69(II), the doctrine of immediate indefeasibility was to apply if a title was obtained by forgery or by means of an insufficient power of attorney. Deferred indefeasibility was only applicable when a title was obtained from a person under a legal disability. However, in *Rogers v Resi Statewide Corporation Ltd*,<sup>7</sup> von Doussa claimed that the section was designed to protect innocent people who had no way of detecting a forgery. If this was its purpose, then immediate indefeasibility should not apply to the recipient of a void instrument. The

<sup>4</sup> ANZCR 1991 Issue 117, 507.

<sup>5</sup> (1991) 55 SASR 359.

<sup>6</sup> (1986) 45 SASR 247.

<sup>7</sup> (1991) 29 FCR 219.

fact that s 69(II) has no equivalent in other Torrens legislation appeared to provide justification for a departure from the accepted stream of authority supporting immediate indefeasibility. In a third case, *Whitem v Arcadi*,<sup>8</sup> DeBelle J criticised von Doussa J's interpretation of s 69(II), claiming that it did not fit well with the rest of the section. The practical effect of von Doussa J's interpretation meant that a registered proprietor who takes bona fide for value as a result of a forgery is in a lesser position than a bona fide registered proprietor who takes in consequence of a fraudulent transaction. DeBelle J felt that the simplicity Torrens envisaged for our registration system was being seriously undermined. In the recent decision in *Tsirikolias v Oakes*,<sup>9</sup> the court also favoured the approach adopted in *Wicklow Enterprises*.

### Victoria

Section 44 of the Transfer of Land Act 1958 received similar scrutiny. In *Chasfild Pty Ltd v Taranto*,<sup>10</sup> despite undeniable similarity in facts to *Frazer v Walker*, Gray J chose not to follow the principle of immediate indefeasibility. Like von Doussa, he found justification for his decision in the "uniqueness" of s 44. Gray J also used the "in personam" exception to attack the validity of Chasfild's claim. This "widening" of the exception has not only drawn subsequent academic comment<sup>11</sup> but is apparent in very recent cases.<sup>12</sup>

Hayne J interpreted s 44 differently in *Vassos v State Bank of South Australia*.<sup>13</sup> He reaffirmed the concept of immediate indefeasibility in Victoria by ruling that a mortgage, although forged, was binding as the bank involved had, on registration, acquired an indefeasible title as mortgagee. His Honour submitted that the "labels" of "immediate indefeasibility" and "deferred indefeasibility" were not principles to be used to draw conclusions about the true construction of legislative provisions. He also stated that no Torrens title legislation provides for "absolute" indefeasibility of title. Both comments help support the theory of "discretionary indefeasibility" subsequently discussed in this paper. On the "in personam" argument, his Honour emphasised that the remedy should only be used in circumstances where equity would regard actions as "unconscionable or unconscientious".

In *Eade v Vogiazopoulos*<sup>14</sup> Smith J declined to follow *Chasfild's* case and claimed that he was bound to follow the decision in *Breskvar v Wall* wherein it was decided that the relevant Victorian legislation (which included the (now) s44(1)) was indistinguishable from its Queensland counterpart. He also ruled that the mere forgery of signatures was not sufficient to support an in personam claim.

<sup>8</sup> Full Court of Supreme Court of South Australia, DeBelle J, 25 September 1992; (1992) 167 LSJS 217.

<sup>9</sup> Supreme Court of South Australia, Burley J, 15 March 1993.

<sup>10</sup> [1991] 1 VR 225.

<sup>11</sup> See, for example: G Teh, "Deferred Indefeasibility of Title in Victoria", (1991) 17 MULR 77; D Skapinker, "Equitable Interests, mere equities, and personal equities: distinctions with a difference" (1994) 68 ALJ 593.

<sup>12</sup> A G Lang "Immediate Indefeasibility of Title Part 2", (1994) ANZCR 65. This article examines two recent cases: *Lissa v Cianci & Anor* (1993) NSW Conv R 55-667 and *Story v Advance Bank Australia Ltd & Anor* (1993) NSW Conv R 55-659. See also *Grgic v Australian and New Zealand Banking Group Ltd* (1994) NSW Conv R 55-698.

<sup>13</sup> (1992) V Conv R 54-443.

<sup>14</sup> (1993) V Conv R 54-458.

## New South Wales

In New South Wales, the in personam exception has recently been used to circumvent the immediate indefeasibility principle. In *Mercantile Mutual Life Insurance Co Ltd v Gosper*<sup>15</sup> the mortgagor, Mrs Gosper, was held entitled to be “freed” from the commitment of a forged, and registered, variation. The force of an “in personam” claim here proved too strong for an obvious case of immediate indefeasibility for the bank. Strong dissatisfaction with this majority judgment has been subsequently expressed.<sup>16</sup>

*Garofano v Reliance Finance Corporation Ltd*<sup>17</sup> a case of a forged mortgage, favoured the principle of immediate indefeasibility. Mahoney JA emphasised the paramount importance of the act of registration. He also failed to find any justification for a personal equity claim. Meagher J supported these findings and dealt decisively with the arguments tendered to escape the doctrine. With respect to s124 of the Real Property Act (the “ejectment” section) he stressed the importance of construing the Act as a whole, not “schizophrenically”. This traditional approach has been reaffirmed in *Grgic v Australian and New Zealand Bank*.<sup>18</sup>

## Overview

Any member of the Australian judiciary cannot feel comfortable in cases involving forgery and the Torrens system. Significant academic comment is testimony to this.<sup>19</sup> While a Court of Appeal decision in New South Wales confirms, once again, the principle of immediate indefeasibility, other States are still uncertain. The recent cases have, at the very least, shown that a blanket application of the doctrine of immediate indefeasibility can, in some cases, produce a result that is far from fair and is likely to undermine public confidence in the system. When the Torrens system was first introduced, the incidence of forgeries was extremely low. Unfortunately the same cannot be said in the 1990s. A system instigated more than a century ago must be made flexible enough to accommodate changes in our society. Moreover, it is essential to recognise that the area of law in question deals with one of the most important assets of individuals in the community – land ownership. Today no-one can realistically expect individuals to accept hopelessly inadequate compensation as an alternative to their being ejected from their property or, as is more likely, to their acceptance of a mortgage commitment. The inflexibility of an absolute immediate indefeasibility principle has surfaced and it would be foolish not to accept that a practical solution must be found. It is submitted that a doctrine of “discretionary indefeasibility” is a constructive alternative.<sup>20</sup>

<sup>15</sup> (1991) 25 NSWLR 32; (1992) ANZCR 27.

<sup>16</sup> See P Butt, (1992) 66 ALJ 596.

<sup>17</sup> Court of Appeal of Supreme Court of New South Wales, Mahoney, Priestly and Meagher JJA, 20 August 1992.

<sup>18</sup> (1994) NSW Conv R 55–698.

<sup>19</sup> See, for example: P Butt, “Shaking the Foundations” (1991) 65 ALJ 611; “System Stands on Shaky Foundations Australian Law News, Jan/Feb 1992, 12; (1991) 117 ANZCR 497; (1993) 129 ANZCR 37; P N Wikrama Nayake, “Immediate and Deferred Indefeasibility Continued” (1993) 67 Law Institute Journal 393; P N Wikrama–Nayake, “Immediate and Deferred Indefeasibility: The Story Continues” (1993) 67 Law Institute Journal 733–735; R Edwards, “Immediate Indefeasibility and Forgery Is it what we really want?” (1993) 67 Law Institute Journal 730; P Butt, “Indefeasibility and Sleights of Hand” (1992) 66 ALJ 596; P Butt, “Torrens Foundations Stabilised” (1993) 67 ALJ 535; D MacCallum, “Return to Immediate Indefeasibility of Title” (1992) 66 Law Institute Journal 970.

<sup>20</sup> J Schultz, “Judicial Acceptance of Immediate Indefeasibility in Victoria (1993) 19 MULR 326, suggests that “the disadvantage of this approach lies in the lack of certainty and costs involved in removing that uncertainty in a particular case”.

## NO WATERS STIRRED IN NEW ZEALAND

The previous discussion of Australian activity in the immediate indefeasibility field must be of significant relevance in all Torrens jurisdictions. In Canada, a recent revival of the debate is evident. Sadly, New Zealand appears to be lagging behind in this contemporary thought. No recent cases on indefeasibility in this country suggest any hint of unsettledness – in every case, the principle of immediate indefeasibility is enforced, irrespective of any possible – and remediable? – unfairness. A detailed analysis of several recent cases shows that, in some instances, strict adherence to one inflexible doctrine can produce a less than ideal solution.

**Morrison v BNZ<sup>21</sup>**

Mr and Mrs Morrison were joint owners of a property in Coatesville. In 1987, they contracted to purchase a property in Browns Bay for \$715,000. Settlement date was set for three months later during which time it was anticipated that they would sell their Coatesville property for approximately \$400,000. This sale did not eventuate as quickly as expected, and Mr Morrison approached the Bank of New Zealand, with whom he dealt often in various business transactions, and was granted a commercial bill facility for \$600,000 to enable the purchase of the Browns Bay property. Mr and Mrs Morrison attended the Bank and signed this, even though Mrs Morrison expressed anxiety at the amount involved. Shortly afterwards, however, there was also executed a memorandum of mortgage given by Mr and Mrs Morrison to the Bank, the security for which was the Browns Bay property. Mrs Morrison denied ever signing this, and the inference was drawn that her husband forged her signature. Later he also apparently forged her signature on a commercial bill acceptance discount facility. The marriage then came to an end and the matrimonial property was divided up. Part of the settlement involved the sale of the Browns Bay property. Mrs Morrison claimed that only then did she become aware of the mortgage to the Bank of New Zealand. The property was sold, a first mortgage to a nominee company was paid off, and other expenses were met. The bank made claim to the remaining \$220,000. The plaintiff, Mrs Morrison, claimed, *inter alia*, that the mortgage was void or otherwise invalid on the grounds of her husband's forgeries.

The discourse on this area of law in the case is significant for its brevity. The defendant naturally submitted that the bank was entitled to complete protection because the mortgage, although forged, had been registered, relying on ss 62 and 183 of the Land Transfer Act 1952 and *Frazer v Walker*.<sup>22</sup> In comparison to the Australian cases discussed earlier, no debate on this issue ensued. Counsel for the plaintiff accepted that he was "constrained by the principle in *Frazer v Walker* [and had to] concede the validity of the mortgage, because of its registration, notwithstanding that the plaintiff did not execute the mortgage".<sup>23</sup> He then proceeded on a different tack, suggesting that the Court should consider the issue of a "course of dealings" between the parties. Accordingly this case unequivocally accepts the principle of immediate indefeasibility.

21 [1991] 3 NZLR 291.

22 [1967] 1 AC 569.

23 [1991] 3 NZLR 291 at 294.

**Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd<sup>24</sup>**

Quigley, a solicitor in partnership, and two of the plaintiffs set up a company, called Farmshare, to buy and sell farms. Cricklewood Holdings Ltd, a subsidiary to this company, had a capital of \$10,000. Quigley and one of the plaintiffs, two of the ten shareholders, owned just more than 80% of the shares. Quigley organised a loan of \$300,000 to be made on a second mortgage to Cricklewood Holdings. This was arranged through his firm's nominee company, the clients involved being entirely unaware of the transaction. The monies were drawn and fraudulently used by Quigley for his own purposes. The mortgage document may well never have been registered, if it had not been discovered in its unregistered state by Quigley's other partners when later dealing with a prior unregistered mortgage involving Cricklewood Holdings and BNZ Finance. Innocently, the other partners saw to it that the nominee company mortgage was registered. The BNZ mortgage was registered subsequently. The plaintiffs sought, inter alia, an order declaring the mortgage to the nominee company void on the grounds that Cricklewood had not authorised it, had not executed it, and it had been obtained by fraud on the part of Quigley. The second plaintiffs (Norbert-Munns, McBride and BNZ Finance) sought priority for the BNZ mortgage claiming that the exception of fraud in s 62 of the Land Transfer Act 1952 should be invoked with respect to the nominee company mortgage.

The decision is interesting on several counts, but comment here is confined to the discussion on s 62 of the Land Transfer Act. It was held that Quigley was not acting as agent for the nominee company. Referring to the case of *Assets Co Ltd v Mere Roihi*<sup>25</sup> and other more recent judgments on the same issue, Holland J concluded that Quigley's fraud could not be "brought home" to the registered proprietors, as Quigley was not acting within the scope of his authority. Accordingly, his Honour ruled that the nominee company mortgage should not be displaced or declared void as it did not come within the exception laid down in s 62.

Although on a different tangent from the Australian cases on forgery, this is a good exposition of the workings of immediate indefeasibility in New Zealand. A desire to adhere to established principles, even if unfairness may occur as a result, is evident. Holland J seems to be comfortable in claiming that "the authority in *Assets Co v Mere Roihi* has never been challenged since it was decided in 1905".<sup>26</sup>

**Jessett Properties Ltd v UDC Finance Ltd<sup>27</sup>**

Capital Investments Ltd was registered proprietor of a property which was mortgaged to ANZ Bank, and was leased to Now Investments Corporation Ltd. The lease (never registered) was mortgaged to UDC Finance. Now Investments ceased paying rent to Capital, and Capital went into arrears with its mortgage payments to ANZ. ANZ entered into an agreement for the sale of the property to a Mr Wallis as trustee for a company yet to be formed. Mr Wallis was a director of Now Investments. The sale was completed with Thara Holdings Ltd being the transferee. A lease was then executed between Thara Holdings and Jessett Properties Ltd. The transfer was registered and, although not clearly stated in the judgment, it

<sup>24</sup> [1992] 1 NZLR 463.

<sup>25</sup> [1905] AC 176.

<sup>26</sup> [1992] 1 NZLR 463 at 479.

<sup>27</sup> [1992] 1 NZLR 138.

is presumed that so also was the lease. Then UDC was advised of the purchase and lease which, if upheld, would effectively deprive UDC of its security. UDC sought an order that Thara, the new registered proprietor, held the property subject to both the lease from Now Investments and the accompanying mortgage. Also, claiming that Jessett had knowledge of the circumstances, UDC sought an order to make Jessett's interests also subject to the lease and mortgage. At first instance, an interim order was granted preventing any further dealings by Jessett and Thara with respect to the property. The hearing in the Court of Appeal was to deal with the issue of whether there was a serious question to be tried.

The Court of Appeal confirmed that there did exist an arguable case that Wallis' fraud was Thara's fraud. It concluded that the evidence available suggested that Wallis sought to defraud UDC in his capacity as agent for Thara. Once again, the principle of immediate indefeasibility was the essential issue here. Interestingly enough, the term was never used throughout the judgment. The Court considered it sufficient to say that, for UDC to succeed, fraud would need to be proved in terms of s 62 and s 182 of the Land Transfer Act.

This in itself provides a curious reflection on the Courts' attitude in New Zealand. The assumption that immediate indefeasibility rules supreme was not challenged. Rather, detailed arguments were given to decide whether the element of fraud involved was sufficient to enable the *exceptions* in s 62 and s 182 to be utilised. It was finally held that Wallis' knowledge of UDC's interests could be imputed to his principals, and that there was thus an arguable case that Wallis' fraud (which was not disputed) was indeed Thara's fraud as well. The Court also ruled that, although there did not seem to be any tangible evidence of an agency relationship between Wallis and Jessett, it seemed mete also to protect the position of UDC against any adverse action of Jessett.

Fairness would seem to have prevailed. It is not disputed that the seeming collusion of the parties to deprive UDC of its interest falls squarely within the ambit of fraud as interpreted in the Land Transfer Act. Maybe that is sufficient, but the lack of reference to the indefeasibility principle when plainly Thara is registered on the title assumes unquestioned acceptance. If the same fact situation had arisen across the Tasman, would the judgment have been more exploratory? Moreover, if fairness can be impugned here, why should the result in *Cricklewood's* case be so different?

### **Dungey v McCallum**<sup>28</sup>

In 1982, the appellant's husband applied for the second time to settle his matrimonial property as a joint family home. His declaration that he was able to pay all his debts pursuant to s 3(1) of the Joint Family Homes Act 1964 was subsequently discovered to be false. However in the interim the property was settled as a joint family home and when the appellant's husband died, the appellant was registered as sole proprietor of the property in 1985. The first respondent, who had earlier sued the appellant's husband, commenced actions against the estate and obtained default judgment for \$61,530. As the estate was insolvent, the Official Assignee was appointed as administrator. In 1990 on application by the appellant, the joint family home settlement was cancelled. The first respondent applied to have it cancelled again.

<sup>28</sup> [1993] 3 NZLR 551.

The first respondent had applied for a second cancellation in order to benefit from the protection provided for creditors under the Joint Family Homes Act 1964. However the Court held that a second cancellation was not possible and that once the settlement was cancelled, the provisions of the Act no longer applied. Thus it was held that the appellant's claim to the property depended on the provisions in the Land Transfer Act 1952. Indefeasibility of title under ss 62 and 63 of the Act meant that she was completely protected. It is made quite clear in the judgment that this would not have been the result if the settlement had not been cancelled. Hardie Boys J referred to Gallen J's reliance, during the High Court hearing, on *Official Assignee v District Land Registrar for Wellington*<sup>29</sup> in which was firmly rejected the argument that those registered as proprietors under the Joint Family Homes Act were protected by the provisions of the Land Transfer Act. It was ruled that the Joint Family Homes Act contained provisions which clearly envisaged a distinction between indefeasibility under the Joint Family Homes Act and indefeasibility under the Land Transfer Act.

While it is submitted that any other interpretation of the Joint Family Homes Act might lead to its misuse, the incongruity which arises from two different constructions of the concept of indefeasibility (a term which incidentally is almost always associated with the Land Transfer Act) does not enhance our legislative provisions. If immediate indefeasibility were not so absolute, it would be unnecessary for our judiciary to find itself faced with two diametrically opposed principles.

While the other causes of action go beyond the scope of this article, it is interesting to note that because the appellant had obtained a title under the Land Transfer Act, any reliance on s 60 of the Property Law Act 1952 would necessarily require proof of fraud on the part of the registered proprietor. Appropriate allegations were not made in this context, and thus the cause of action was struck out. It would maybe have been interesting to witness an argument on this score in the light of previously mentioned cases.

### **Disher v Farnworth**<sup>30</sup>

The appellant and respondent were beneficiaries under a will which provided for a property to be subdivided into two parts. Mrs Disher was to inherit the higher part, Mrs Farnworth and another the lower part, and there was to be a restrictive covenant preventing a two-storey house being built on the lower part. Mrs Disher met with the surveyor and ensured that in the unit title subdivision there was included a height restriction restricting building to a single-storey house of minimum height, such restriction being more stringent than was contemplated by the will. The necessary registration was completed. Mrs Farnworth's architect drew up plans in accordance with the will but not in accordance with the more stringent requirements on the unit title. After some altercation Mrs Disher issued proceedings for an interim injunction to prevent Mrs Farnworth proceeding further with her construction which had already started. Mrs Farnworth, while removing earlier caveats, asked for declarations which, inter alia, would allow her to increase the height of her building.

<sup>29</sup> Court of Appeal, Wellington, 18 March 1971, CA 22/70.

<sup>30</sup> [1993] 3 NZLR 390 (CA).



In the High Court it was concluded that Mrs Disher owed Mrs Farnworth a fiduciary duty to ensure that the latter knew that the height restriction as it appeared on the unit title was greater than was contemplated by the will. Other matters not particularly relevant in this context were also discussed.

On appeal, the question of fiduciary duty was addressed. Within this context there naturally arose the issue of indefeasibility of title, and the in personam exception. Because the transfers had been registered (the caveat which had been lodged by Mrs Farnworth when the titles were still in the executrix' name had, for unexplained reasons been removed) Mrs Disher had an indefeasible title which entitled her to an undivided share of the common property which of course now included disputed airspace. Counsel for Mrs Farnworth, considering the case of *Secureland Mortgage Investments Nominees Ltd v Harman & Co Solicitor Nominee Co Ltd*<sup>31</sup> sought to overcome this problem by using the in personam exception. As the Court had already overturned the High Court's finding of a fiduciary obligation, it dealt with this argument very laconically:

In the present case there is no contract between the parties, and Mrs Disher has not entered into a fiduciary relationship. It follows that Mrs Disher has acquired an indefeasible title.<sup>32</sup>

Such a pithy dismissal of the in personam exception accords with other recent New Zealand judgments on indefeasibility. It substantiates the attitude that this principle has had its ambits defined and these must be applied without enquiry. While the circumstances differ markedly, it is difficult to ignore the extensive debates which ensued in *Gosper* and other Australian cases where the judiciary seemed so uncertain of the ambits of this exception. The confidence – or is it over-confidence? – of our courts is now questionable.

#### WHERE DOES CANADA STAND?

Decisions on forgery cases in Canada have shown a marked preference for the concept of deferred indefeasibility. The Canadian judiciary has favoured the idea that the title of a person who has obtained registration as a result of a forged instrument should be defeasible. The basic reasoning behind this is that there exists no enactment which enables the registered right of a person under a null deed to be protected by the rule of indefeasibility.<sup>33</sup> Canada thus still appears to be holding out against the tide of opinion that followed the *Frazer v Walker* decision. However, in 1971, a case in Canada returned an unexpected decision favouring immediate indefeasibility. This case is examined, together with the accepted line of decisions that places Canada very much in the deferred indefeasibility camp.

#### Deferred indefeasibility decisions

Di Castri lists three categories within which the indefeasibility principle appears to fall.<sup>34</sup>

1. B forges A's name to a transfer purporting to be from A to B. The transaction is as void under the appropriate land legislation as it would be at common law: *Re Adams and McFarland*.<sup>35</sup>

<sup>31</sup> [1991] 2 NZLR 399.

<sup>32</sup> *Ibid*, at 401.

<sup>33</sup> Di Castri, *Registration of Title to Land*, (1987) Carswell, 760.

<sup>34</sup> *Ibid*, at 758–9.

2. B forges A's name on a transfer transferring land from A to C and C obtains registration. If no further transfer of the land takes place C, although entirely innocent, loses the land and A redeems ownership; *Shetler v Foshay*; <sup>36</sup> *Pik Har Kwan v Kinsey*; *Morisseau v Kinsey*.<sup>37</sup> If the land has been transferred again, the new registered proprietor keeps it and A must resort to monetary compensation: *Brown v Broughton*.<sup>38</sup>
3. Mortgage forgery: C is registered as mortgagee by A forging the signature of the original registered proprietor B, or C, a bona fide purchaser for value, is registered as mortgagee by A forging and registering a transfer to himself. In the former case the mortgage is deemed a nullity, in accordance with the principles applied to a transfer in similar circumstances. In the latter situation, however, the mortgage survives because the fraud cannot be "brought home" to C or his agents: *Pik Har Kwan v Kinsey*; *Morisseau v Kinsey*; <sup>39</sup> *De Lichtbuer v Dupmeier*.<sup>40</sup>

### The in personam exception

Canadian authorities address the in personam exception as seriously as their counterparts in Australia. It is suggested by Di Castri that its presence mitigates the split between immediate and deferred indefeasibility. It is significant to note that Canada relies heavily on Australian authority to emphasise the point that the uncertainties surrounding this exception leave wide open the possibility of its use, should immediate indefeasibility lead to an unfair result. Ironically it is in the New Zealand case of *Frazer v Walker* where this was so clearly suggested by Lord Wilberforce after laying down the principle of immediate indefeasibility.<sup>41</sup>

In doing so they ( their Lordships) wish to make clear that this principle in no way denies the right of the plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant.

### Hermanson v Martin

While generally the Canadian Courts have preferred to apply a policy of deferred indefeasibility, in *Hermanson v Martin*<sup>42</sup> the Saskatchewan Court of Appeal opted for immediate indefeasibility. Following a divorce, one of the joint owners sold the matrimonial home. That owner instructed his solicitor to prepare a transfer and was correctly told that his ex-wife would also need to sign it. The husband returned with a person whom he introduced as being his ex-wife and the document was duly signed by both. The transfer and accompanying mortgages were registered. Of course the woman was an imposter and the wife's signature was thus a forgery. At first instance, McIntyre J decided to follow *Frazer v Walker* and *Assets Co v Mere Roihi*<sup>43</sup> and thus ruled that the bona fide purchaser was protected

<sup>35</sup> (1914) 6 WWR 1076 (Alta).

<sup>36</sup> (1915) 8 WWR 852.

<sup>37</sup> (1979) 10 RPR 44 (BCSC).

<sup>38</sup> (1915) 8 WWR 889.

<sup>39</sup> (1979) 10 RPR 44 (BCSC).

<sup>40</sup> (1941) 3 WWR 64 (Sask).

<sup>41</sup> *Frazer v Walker* [1967] 1 AC 569, 585.

<sup>42</sup> [1982] 6 WWR 312; [1987] 1 WWR 439.

<sup>43</sup> [1905] AC 176.

against any adverse claims. Indeed, this was a clear enunciation of immediate indefeasibility. He rejected the argument that interpretation of the relevant sections in the Saskatchewan Act suggests deferred indefeasibility. He stated that "[I]ndefeasibility of title is made an incident of registration ... and where a bona fide transferee for value succeeds in having his interest registered, the fact of registration is conclusive ...".<sup>44</sup>

This case went on appeal in 1986. The appeal was dismissed on the same grounds of conclusiveness of title, but comments made by Brownridge JA suggest that the principle may be qualified.<sup>45</sup>

Finally, there are no doubt cases where the registered owner, having been deprived of his title by forgery or fraud, should have his title restored. But this is not such a case. The issue in this case is about indefeasibility of title and the present registered owner has been the registered owner since 29th May 1975. It is neither just or equitable that he should now be deprived of his title because of the fraud of others if that can be avoided. As Lord Wilberforce pointed out in *Frazer v Walker*, there is nothing to prevent the court from granting equitable relief as the circumstances require even if it cannot or feels it ought not to take away the title of the present registered owner and restore it to a former owner ....

Exactly what type of "equitable relief" Brownridge JA contemplated is not made clear. If, however, he was intending to confine such relief to monetary compensation, the comments made in the first sentence of the above extract make no sense. Rather, this is a statement supporting the idea that solutions for fraud/forgery cases should be "just and equitable" for all the parties involved. His interpretation of *Frazer v Walker* is refreshingly wide.

In the light of this decision both in the first instance and then on appeal, the Canadian courts have been required to decide whether to continue to advocate their theory of deferred indefeasibility, or to "change tack" and adopt the alternative concept of immediate indefeasibility. To their credit, thought has also been given to related issues, not the least of which is the in personam exception. There appears to be a definite reluctance in most Canadian states to change their orthodox stance. In British Columbia the re-enacted Land Registry Act (1979), admittedly before the *Hermanson* decisions, adopted language obviously designed to infer deferred indefeasibility. Similarly, in 1971 the *Annual Survey of Commonwealth Law*<sup>46</sup> made statements suggesting that the basic flaw of immediate indefeasibility was that it made "all titles to land ... precarious". If the reader feels that attitudes would have changed following the *Hermanson* decision, Di Castri suggests otherwise.<sup>47</sup>

However, assuming further that the legislature's current view favours deferred indefeasibility, it is suggested that s 277(2) [Land Registry Act, Saskatchewan] be suitably amended to remove any doubt as to its ambit. If, on the other hand, the theory of immediate indefeasibility should gain legislative acceptance, then the case of "the unlucky mortgagee" who takes a mortgage from a registered owner who turns out to be a fictitious person (*Gibbs v Messer*) should also be examined .... Finally, it may be observed that the principle of law reform requires there to be a compelling reason to change an established rule of common law [*Heydon's Case* (1584), 3 Co Rep 7b].

As has been most aptly said by a Canadian writer:<sup>48</sup>

<sup>44</sup> Ibid, on Appeal.

<sup>45</sup> Ibid 455.

<sup>46</sup> *Annual Survey of Commonwealth Law* (1971), 236.

<sup>47</sup> See above note 34 at 760.

<sup>48</sup> J Lee, "Registrar of Regina Land Registration District v *Hermanson et Al*" (1988) 52 Sask L Rev 303.

Maintaining an appropriate balance between the unique legal regime of the Torrens system of land registration and the general doctrines of Anglo-Canadian law has always been a challenging task for the Canadian judiciary. The smouldering contradictions between Torrens law and the general law have traditionally ignited most fiercely over the principle of indefeasibility of title.

While the *Hermanson* case may have come close to upsetting the balance in Canada generally, it seems evident that the concept of deferred indefeasibility still predominates.

#### HOW CAN THESE CASES BE RECONCILED?

The Torrens jurisdictions of Australia, New Zealand and Canada display a disturbing lack of uniformity in these recent indefeasibility decisions. The Australian and Canadian courts appear ready to apply the concept of either immediate or deferred indefeasibility as appropriate in the circumstances, and each case is considered on its own facts. Some decisions, however, appear irreconcilable. This may explain the sudden expansion of the in personam exception. The New Zealand judiciary still pursues the traditional acceptance of immediate indefeasibility, and is reluctant to depart from this under any circumstances.

The struggle in Australia and Canada to adopt a humane approach has inadvertently helped widen the rift between immediate and deferred indefeasibility. The two schools of thought still stand rigidly apart and each case construed on its circumstances bespeaks expensive and time-consuming litigation. All this places an "undue strain on the cornerstone of indefeasibility registration without fraud".<sup>49</sup>

It is significant that all three countries have, at some stage, had committees investigate this controversial area.<sup>50</sup> In New Zealand the plethora of dissatisfaction following the decision in *Frazer v Walker* demanded this; in the other two countries, a desire to create a uniform Torrens title was the motivating factor. The cases reviewed in this article glaringly neglect the resulting, and remarkably similar, recommendations. The essential theme underlying the reports is "fairness"; the problem arising from them is how best to serve this ideal. The emphasis is expressed most clearly in the following statement:<sup>51</sup>

In the case of forged instruments, there may be some cases in which the rule of immediate indefeasibility yields a harsh result, and some cases in which it produces a satisfactory result (or, more accurately, would produce a satisfactory result if the compensation provisions were adequate). Similarly, where instruments are void for some reason other than forgery, there could be some cases where the rule of immediate indefeasibility would be satisfactory (eg *Mardon v Holloway*<sup>52</sup>) and other cases where it would be unsatisfactory (eg *Boyd v Mayor of Wellington*<sup>53</sup>).

<sup>49</sup> P Butt (1992) 66 ALJ 596.

<sup>50</sup> New Zealand: Report: Property Law and Equity Reform Committee *The Decision in Frazer v Walker* June 1977. Australia: Victorian Law Commission *Report on the Torrens Register Book* Report No 12, 1987. Canada: Joint Titles Committee *Renovating the Foundation: Proposals for a Model Recording and Registration Act for the Provinces and Territories of Canada*, July 1990. Alberta: *Proposals for a Land Recording and Registration Act for Alberta* Report No 69, Alberta Law Reform Institute, October 1993.

<sup>51</sup> New Zealand: Report: Property Law and Equity Reform Committee *The Decision in Frazer v Walker* June 1977, 9.

<sup>52</sup> [1967] NZLR 372.

<sup>53</sup> [1924] NZLR 1174.

The Property Law and Equity Reform Committee in New Zealand offered the following solutions for the law relating to the registration of forged and other void instruments.

- (a) Discretion be given to the High Court, in cases where any void instrument has been registered, to either order that the former registered proprietor's name be restored to the register or to declare that the title of the person who registered the void instrument be indefeasible.
- (b) Appropriate changes be made to the compensation provisions in the Act.
- (c) Detailed guidelines be provided in any amending legislation outlining matters which should be taken into account, but not restricting matters which the Court may see fit to consider.
- (d) The anomaly which exists with respect to a fictitious person (the ratio decidendi in *Gibbs v Messer* having been reduced to this, but not eliminated) be removed.

This element of court discretion was also introduced in the Victorian and Canadian reports.

The Victorian Law Commission recommended the adoption of the principle of deferred indefeasibility where forged instruments were involved. To the question of "which party should be given the land and which should be compensated" it felt it would be "more likely that compensation [would] be adequate for the innocent third party than for the person whose title [was] altered".<sup>54</sup> However, it also recommended that if adherence to this deferred indefeasibility principle resulted in undue hardship, the Court should be able to reverse the result.

In Canada, the 1990 report made it clear that a strict following of the *Frazer v Walker* principle was "too rigid and [was] likely to have unfair results".<sup>55</sup> To overcome this problem, it introduced the term "discretionary indefeasibility". Section 5.6(3) of the Model Act sets out a general rule whereby a displaced registered owner resumes ownership and the new registered owner receives the compensation (the deferred indefeasibility rule). However the Committee accepted that this rule should not be inflexible. It acknowledged that circumstances do vary and that, in some cases, it may be fairer and cheaper to leave the land with the new registered proprietor and compensate the one who has been displaced. In s 5.6(4) the Court is given power and necessary guidelines, comprising a set of listed circumstances, to do this, if it considers it more "just and equitable".<sup>56</sup> The list of circumstances are simple, sensible and very much in line with modern-day living. They comprise:<sup>57</sup>

- (i) The nature of the ownership and the use of the property by either of the parties.
- (ii) The circumstances of the invalid transaction.

<sup>54</sup> Victorian Law Commission, op cit n 50, p 11-12. With respect to J Schultz' criticism, see above n 20.

<sup>55</sup> Canada, op cit n 50, p 1.

<sup>56</sup> Ibid p 26.

<sup>57</sup> Ibid p 109.

- (iii) The special characteristics of the property and their appeal to the parties.
- (iv) The willingness of one or both of the parties to receive compensation.
- (v) The ease with which the amount of compensation for a loss may be determined.
- (vi) Any other circumstances which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its powers under subsection (4).

These recommendations have been adopted by the Alberta Law Reform Institute<sup>58</sup>.

Generally, these proposals come close to achieving the two, sometimes diametrically opposed, purposes of the Torrens system: the provision of security of ownership while maintaining facility of transfer so that a purchaser can become a registered owner quickly, cheaply and safely. Their adoption places the immediate/deferred debate in an entirely different perspective. The Canadian and Australian reports favoured deferred indefeasibility subject to a discretionary right of the Court. The New Zealand committee found “no compelling reasons ... for changing the law relating to indefeasibility of title as stated in *Fraser v Walker*” and felt it should remain “subject to the abrogation of the decision in *Gibbs v Messer* and subject to introducing legislation [as suggested]”<sup>59</sup> In the final analysis, the problem is solved. No matter from which direction it comes, the element of Court discretion provides the flexibility necessary to achieve consistent fairness.

<sup>58</sup> Op cit n 50.

<sup>59</sup> Op cit n 50, p 11.